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Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2001

KENNETH ALLEN GOLDBLATT
Plaintiff-Petitioner,

v.

A&W INDUSTRIES, INC.
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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35 pp

QUESTIONS PRESENTED

I.

CAN A COURT SUMMARILY DENY A TEXAS LITIGANT'S HOMESTEAD CLAIM BASED ON THE RETROACTIVE APPLICATION OF A 1999 CHANGE IN THE STATE CONSTITUTION THAT OCCURRED DURING THE PENDENCY OF LITIGATION WITHIN WHICH THE HOMESTEAD CLAIMANT WAS PREVENTED FROM TAKING POSSESSION OF THE SUBJECT REAL ESTATE BY A TEMPORARY INJUNCTION GRANTED TO THE RESPONDENT?

II.

CAN APPEAL BE DENIED TO A LITIGANT ASSERTING "EXCUSABLE NEGLECT" ON THE PART OF HIS ATTORNEY OF RECORD WHOSE HEALTH DUE TO COMPLICATIONS OF DIABETES FORCED HIM TO FILE A MOTION TO WITHDRAW AFTER PERFECTING THE APPEAL BUT PREVENTED HIM FROM FULFILLING HIS OTHER MINISTERIAL FUNCTIONS RELATED TO THE APPEAL?

LIST OF PARTIES

Appellant certifies that the following persons may have an interest in the outcome of this case:

1. Kenneth A. Goldblatt, Petitioner.
2. Frank P. Hernandez, Petitioner's Counsel of Record.
3. A & W Industries, Inc., Respondent.
4. Frank R. Jelinek, Respondent's Counsel of Record.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE UNITED STATES SUPREME COURT:

Kenneth Allen Goldblatt (hereinafter "Goldblatt") petitions for a *writ of certiorari* to review, reverse and remand the judgment of the United States Court of Appeals for the Fifth Circuit wherein Goldblatt's assertions of his entitlement to presumption of his Business Homestead claim under Texas law had been erroneously denied by the courts below and that his attorney of record's failure to complete the ministerial requirements of his appeal after proper notice was given was due to excusable neglect due to the attorney's rapidly deteriorating health from complications of diabetes that forced his withdrawal from the case between the time the attorney gave notice of appeal and the dates required to complete the actions for appeal to the U.S. District Court from the Fort Worth, Texas Bankruptcy Court.

OPINIONS BELOW

The Bankruptcy Court denied Goldblatt's Business Homestead claim on February 28, 2001. An unpublished Order of the District Court was issued on April 19, 2001. See Appendix A. The unpublished Opinion of the Court of Appeals affirming the opinion of the District Court was issued on October 18, 2001. See Appendix B. Goldblatt's petition for Rehearing was denied by the Court of Appeals on November 19, 2001.

JURISDICTION

The jurisdiction of this Court is invoked under its review authority under 28 U.S.C. Sec. 1254(1) and 2101(c). The date of the last judgment sought to be reviewed is November 19, 2001.

APPLICABLE STATUTES

Bankruptcy Rule 8001(a) states in pertinent part:

An appeal from a judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel as permitted by 28 USC § 158 (a)(1) or (a)(2) shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An ***appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate***, which may include dismissal of the appeal. [emphasis added][1]

STATEMENT OF THE CASE

This is a Texas Business Homestead and attorney "excusable neglect" case.

This case concerns two seminal issues:

1. The first issue is a bankruptcy court's refusal to follow long-settled Texas law regarding Goldblatt's Business

[1] The applicable Texas statutes are set forth in the text of this Writ of Certiorari

Homestead claim on property that he has been twice adjudged to own by virtue of a legal foreclosure on June 6, 1994, but of which he has been prevented from taking possession by unceasing litigation by A&W Industries, Inc. (hereinafter, "A&W") initiated before the foreclosure. During that period, the Texas Constitution was amended to require occupancy of a business homestead property by the claimant. In its ruling, the Bankruptcy Court erroneously found that Goldblatt claimed a residential homestead, separate from the Business Homestead property. Such finding was factually incorrect.

2. The second issue is the Federal District Court's rejection of Goldblatt's appeal of the Bankruptcy Court's decision because Goldblatt's bankruptcy attorney of record, physically unable to perform ministerial duties of the appeal due to severe complications of diabetes resulted in late filing of the designation of the record although the appeal had otherwise been timely and properly noticed.

A. Course of Proceedings and Disposition Below

On February 14, 2001, the Bankruptcy Court erroneously held that Goldblatt's business homestead claim should be denied because it did not fulfill the requirement of Article 16, § 51 of the Texas Constitution or § 41 of the Texas Property Code as amended because "the debtor has never been in possession of the Dawn Lane premises to conduct the debtor's business, and that the debtor has never lived in or on the Dawn Lane premises; and that the Dawn Lane premises is not contiguous to the debtor's residential homestead at 3605 Wharton Drive, in Fort Worth, Texas 76133."

On February 28, 2001, the Bankruptcy Court signed the Order Determining Status denying Goldblatt's business homestead claim.

On March 7, 2001, Goldblatt's bankruptcy attorney timely filed notice of appeal of Goldblatt's business homestead claim. A designation of the record was not filed until April 9, 2001 when, at the same time, Goldblatt's Motion to Extend Procedures and Deadlines was filed.

On April 12, 2001 the trial court denied the Motion to Extend and dismissed the appeal citing a failure to show excusable neglect.

Goldblatt made a timely appeal to the Court of Appeals for the Federal Fifth Circuit. The action of the District Court was affirmed on October 19, 2001. Goldblatt's Motion for Rehearing was denied on November 19, 2001.

STATEMENT OF THE FACTS

On May 11, 2000, the Probate Court Number 2 of Tarrant County, Texas, ruled that Goldblatt was the owner of the subject real estate but granted a money judgement against Goldblatt and permanent injunction ordering Goldblatt not to interfere "in any way with the business and operation of A&W Industries, Inc. or the real or personal property of A&W Industries, Inc., including the leased property located at 827 Dawn Lane, Grapevine, Texas . . . ."

Goldblatt had foreclosed the property on June 6, 1994, and the Probate Court granted a Summary Judgment as to ownership on May 27, 1997 in Cause No. 90-1522-C-2 in Probate Court No. 2 of Tarrant County, Texas, and reaffirmed Goldblatt's ownership in its rendition of the May 11, 2000 Judgment.

There is no dispute as relates to ownership of the property. On June 5, 2000, Goldblatt filed an Affidavit of Business Homestead of record in the Tarrant County, Texas

Deed Records. At the time of such filing, Goldblatt claimed no other real estate as his homestead, and has never claimed any other property as homestead in Texas or any other United States jurisdiction. After filing his homestead affidavit, Goldblatt began trying to evict A&W from his Business Homestead because he wanted to occupy the property.

On August 18, 2000, A&W filed an unopposed motion to lift stay in the Bankruptcy Court, which resulted in an unopposed order, on September 1, 2000, which, in part, allowed Goldblatt to proceed with a "Suit for Forcible Detainer filed by debtor against A&W Industries, Inc. and all occupants in Cause No. F-23506, in the Justice Court, Precinct 3, Tarrant County, Texas, as to the property located at 827 Dawn Lane, Grapevine, Texas" in the Justice Court.

As part of its attempts to prevent Goldblatt from taking possession of his business homestead, A&W has:

1) Caused multiple delays in the justice court suit.
2) Filed an Original Proceeding in the Second Court of Appeals of Fort Worth, Texas in a futile effort to obtain a Writ of Prohibition against the justice of the peace hearing the eviction suit. The Second Court of Appeals denied A&W's petition for the Writ of Prohibition.
3) And instigated an illegal contempt hearing in the probate trial court.[2]

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[2] A&W's appellate counsel admitted that the hearing in the trial court was illegal when he stated in his "Response to Petitions for Mandamus, Writ of Prohibition, and Writ of Habeas Corpus" in Cause Nos. 02-00-401-CV and 02-00-402-CV, In the Court of Appeals, Second District of Texas, Fort Worth, Texas, that: "The concise and candid response to that question [Did the trial judge have jurisdiction to find Goldblatt in contempt?] is: At the time we all thought we did, and we had a case that said he did, but now we realize that he probably

The Second Court of Appeals of Fort Worth, Texas, held that the contempt hearing was held without jurisdiction.

A&W has failed and refused to pay rent to Goldblatt since the date of the underlying judgment of May 2000, thereby unjustly enriching itself at Goldblatt's expense. At the illegal contempt hearing, held after the plenary power of the trial court had expired, the judge granted A&W offsets against its May 11, 2000 judgment on rentals demanded by Goldblatt. This order, issued without jurisdiction, is a violation of Section 362 of the U.S. Bankruptcy Code and a violation of Goldblatt's Fourth Amendment Constitutional rights of unreasonable seizure.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit and the courts below have erred in applying both state and Federal law, authority and guiding principal to the issues of this appeal. Those actions should be corrected by this Court. The original decision of the Bankruptcy Court was based on a error of fact, that Goldblatt had a "residential homestead," which was not, and is not true. The error was compounded by the appeals forums' error in failing to find that the errors of Goldblatt's bankruptcy attorney of record to complete the ministerial duties of the appeal were the result of "excusable neglect" and that both the District Court and the Fifth Circuit failed to even consider whether other sanctions might have been appropriate. The result has been deprivation by the courts below of Goldblatt's state constitutional rights of Business Homestead and Federal constitutional rights of property and due process. Justice and equity demand writ of certiorari be granted in this case to correct the existing abuses of discretion.

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didn't. . . . A&W has researched the issue and now concedes, with no little chagrin, that there is an exception to the general rule where contempt motions are concerned."

STANDARD OF REVIEW

On appeal of a bankruptcy proceeding, a Court of Appeals applies a two-level standard of review:

1) Factual findings of bankruptcy court are reviewed under a "clearly erroneous" standard, and are overturned only when the Court of Appeals is left with firm and definite conviction that the bankruptcy court committed a mistake,

2) Legal conclusions of the bankruptcy court are reviewed under less deferential "de novo standard", and, if bankruptcy court premises findings of facts on an improper legal standard, such findings of facts lose the insulation of the protection of the clearly erroneous rule.

The decision of the Court of Appeals is reviewed for abuse of discretion. The discretion is abused if the ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

To merit relief from final judgment for mistake, inadvertence, surprise, or excusable neglect, a defendant must show that failure to file timely answer or otherwise defend resulted from justifiable neglect and that fair probability of success on the merits exists. Factors to consider include extent of prejudice to plaintiff, the merits of defendant's asserted defense, and the culpability of defendant's conduct.

SUMMARY OF ARGUMENT

Goldblatt is entitled to remand to the Bankruptcy Court because the Bankruptcy Court erred in denying Goldblatt's Business Homestead claim based on the erroneous finding of fact that Goldblatt's residence was his homestead.

Goldblatt is entitled to remand to the district court because the district court erred in denying Goldblatt's appeal on procedural grounds when there was excusable neglect on the part of Goldblatt's lawyer of record. The District Court

further erred when it failed to consider lesser sanctions before dismissing the appeal.

The courts below have failed to follow the applicable state and Federal law applicable to the facts of this case and deprived Goldblatt of his constitutional rights of property and due process in so doing.

ARGUMENT

Both courts in question have erred in applying law, guiding principles and authority to the facts of this case.

A. Goldblatt was entitled under applicable Texas law, authority and guiding principle to the presumption of Business Homestead by the Bankruptcy Court and the Bankruptcy Court erred finding that Goldblatt claimed a residential homestead and in its application of a retroactive change in the Texas Constitution to the facts of this case.

In this case, the Bankruptcy Court's finding that the subject property "is not contiguous to the debtor's residential homestead" is clearly erroneous because no such "residential homestead" exists or has ever existed in the State of Texas or any U.S. jurisdiction. Further, the Bankruptcy Court's finding that Goldblatt has never occupied the property is in conflict with guiding principles of Texas homestead law and ignores Goldblatt's strenuous efforts to legally evict A&W from his homestead since 1994, so that he can take possession and occupy the property as his business homestead.

A&W sued Goldblatt in the 141st District Court on March 28, 1994 after Goldblatt purchased the mortgage note secured by the subject real estate, but before he foreclosed the property on June 6, 1994. From September, 1994 until the judgment of the Probate Court on May 11, 2000,

Goldblatt was prevented from taking possession of his real estate by a temporary injunction of the 48th District Court of Tarrant County, Texas that dissolved by operation of law on May 11, 2000.

When Goldblatt was deposed on July 31, 1996 in Cause No. 90-1522-A-1 in the Probate Court No. 1 of Tarrant County, Texas, he stated his intention to operate his business on the subject property at the conclusion of the litigation.[3] Goldblatt has operated various businesses continuously since the mid-1970's, both on the East Coast and in Texas, out of residential properties of which he was the record owner without having a primary commercial business address and without ever having declared any other piece of real estate in Texas or anywhere else in the United States as his "homestead."

The Texas Constitution has, since 1876, exempted from forced sale debtors' real property used as their family's primary place of business. *Waggener v. Haskell*, 89 Tex. 435, 35 S.W.1, 1-2, (Tex. 1896.) The Texas Property Code also provides for this business homestead exemption. Texas Property Code § § 41.001-.002 (Vernon Supp.1998)[4].

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[3] After testifying that he ran an apartment rental operation in Lake Worth, Texas [page 23, lines 2-5], Goldblatt testified that he generated business income from "the Grapevine property." [page 24, lines 15-17] When asked by opposing counsel "Do I understand correctly that you want to be in the vault business in Fort Worth?" Goldblatt replied, "Oh, yeah, Grapevine. Let's be accurate, Counsel." [page 115, lines 19-22]

[4] § 41.002. Definition of Homestead

(a) If used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon.

Further, in *Broadland v. City National Bank of Corpus Christi*, 15 S.W.2d 112, 113, (Tex.Civ.App. 1929) the court addressed this very issue stating: "In Texas actual occupancy of land is not absolutely essential to impress property with the homestead character, but property may become a home [homestead] by intention when such intention is accompanied by unmistakable acts that evidence the designation of a homestead." In so holding, the courts have been motivated to secure the benefits of the homestead law in Texas for impecunious persons. *Cameron v. Gebhart*, 85 Tex. 610, 22 S.W.2d 1033, 24 Am.St.Rep. 832 (Tex. 1893), *Conlee v. Merchants' & Planters' Lumber Co.*, 173 S.W. 586, 587 (Tex.Civ.App. 1914); *Jolesch & Chaska Co. v. Hampton*, 297 S.W. 271, 273 (Tex.Civ.App.-Waco 1927 writ refused).

(b) If used for the purposes of a rural home, the homestead shall consist of:
(1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or
(2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.
(c) A homestead is considered to be urban if, at the time the designation is made, the property is:
(1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and
(2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality:
(A) electric;
(B) natural gas;
(C) sewer;
(D) storm sewer; and
(E) water.
(d) The definition of a homestead as provided in this section applies to all homesteads in this state whenever created.

The court stated in *Espinoza v. Cocke*, 276 S.W. 1095, (Tex.Com.App. 1925) at 1096:

"The Texas Supreme Court has held that when an appellant demonstrated the required overt acts and intention to be entitled to a favorable homestead determination and an appellee's evidence to contradict such entitlement was insufficient to determine otherwise, the case should be remanded. When the Texas Supreme Court found that the record on appeal did not support the implied finding of the lower court, it ruled that the lower court's implicit finding of no homestead was in error." *Parrish v. Hunt*, 160 Tex. 378, 331 S.W.2d 304, 305 (Tex. 1960); See also: 43 TEX. JUR. 3d, Homesteads, Sec. 77, 135- 137 (1985).

The Texas Supreme Court in *Cameron v. Gebhard*, 85 Tex. 616, 22 S. W. 1033, 1035, (Tex. 1893) 34 Am. St. Rep. 832, stated unequivocally:

> "If a homestead cannot be acquired until it is occupied, then no one can acquire a homestead exempted from forced sale unless he buys an improved place; and then he must have a race with the sheriff for possession. The unimproved lands of the country and the vacant lots of our cities cannot be acquired for the purpose of making a home by the man who is indebted, except at the risk of turning it over to a creditor. If a man owes nothing, or is able to pay all that he owes, he does not need the exemption; if he has other property, he can protect his home by pointing out that other property is for sale; but, if he has nothing but the homestead, he comes within the necessity of the constitutional provision, and to him is the chief value of exemption."

The *Cameron* Court cited *Gardner v. Douglass*, 64 Tex. 76, (Tex. 1885) in which the party asserting the homestead claim had purchased an improved place for the purpose and with the avowed intention of making it a homestead. It was leased, and he could not get possession of it at the time. It was seized before he moved upon it, and the court held that his intention to occupy, with the fact that he could not get possession, were sufficient to give the homestead exemption. The facts of the *Gardner* case are so similar to the facts of this case that the holdings in both *Gardner* and *Cameron* are decisive of the issue under discussion. Gardner, in fact, is a "white horse" case on this issue.

C. **The District Court and the Fifth Circuit abused their discretion in failing to find that the omissions of Goldblatt's bankruptcy attorney of record were the result of excusable neglect.**

The Fifth Circuit Court held in *In re CPDC Inc.* 221 F.3d 693, (5th Cir. 2000), that Appellants who filed their appellate brief timely and prior to the district court's dismissal of the appeal were entitled to proceed with their appeal.

Further, it is instructive to look at Bankruptcy Rule 8006[5] for guidance in this matter. FRAP Rule 6(b)(2)(ii)

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[5] Rule 8006. Search Term End Record and Issues on Appeal Within 10 days after filing the notice of appeal as provided by Rule 8001(a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the appellant's statement the

clearly refers to and parallels Bankruptcy Rule 8006's requirement that a party appealing to a district court or bankruptcy appellate panel "file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented." As Bankruptcy Rule 8001(a) makes clear, "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal ***does not affect the validity of appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal***".[emphasis added] Other circuits have held that an appellant's failure to comply with procedural rules such as Rule 8006 warrants

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appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the cross appellant's statement, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

dismissal of the appeal pursuant to Rule 8001(a). Bankruptcy Rule 8001(a) states: "An ***appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate***, which may include dismissal of the appeal." [emphasis added] See *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (affirming district court's judgment dismissing appellants' appeal for failure to comply with Bankruptcy Rules 8006 and 8009(a)); *Serra Builders, Inc. v. John Hanson Savings Bank FSB*, 970 F.2d 1309, 1311 (4th Cir. 1992) (affirming the district court's sanction of dismissal for appellant's failure to file its designation of the record pursuant to Rule 8006 until twenty-five days after filing notice of appeal); but cf. *Fitzsimmons v. Nolden*, 920 F.2d 1468, 1472 (9th Cir.1990) (observing that ***district court must first consider alternative sanctions in lieu of dismissal for failure to comply with Rule 8006 unless the case presents egregious circumstances*** such as bad faith on the part of the appellant). [emphasis added]

In the Fifth Circuit, "good cause" has been equated with excusable neglect. See *McDonald v. United States*, 898 F.2d 466, 467 (5th Cir. 1990). Inadvertence, mistake or ignorance of counsel did not establish good cause. *Id.*; see also *McGinnis v. Shalala*, 2 F.3d 548 (5th Cir. 1993). A reasonable basis for noncompliance within the time specified had to be shown. See *Parson v. Cole* (*In re Cole*), 142 B.R. 140 (Bankr.N.D.Tex. 1992) (citing *McDonald*).

Surely the devastation of a lawyer by such serious, vision-threatening illness constitutes "good cause" for the failure to meet an administrative deadline of the appeal procedure.

In this case the district court did not consider any alternative sanctions and relied on its determination that the actions of Goldblatt's attorneys were not excusable neglect.

The United States Bankruptcy Appellate Panel of the Sixth Circuit found in *In re John W. Schultz* that the attorney's neglect in failing to file timely notice of appeal, or timely motion for extension of time to appeal was excusable neglect when the attorney's wife was hospitalized with neutropenic fever and the attorney was the wife's sole caregiver. The court held these circumstances constituted excusable neglect. The court held "excusable neglect" is a question of law, the resolution of which is subject to *de novo* review.

In *Schultz* the Court pointed out that

> "Other courts have determined that excusable neglect includes sudden death, ***disability or illness of counsel*** or the party." [emphasis added] 259 B.R. 154. The instances cited included illnesses of the attorney's wife, an attorney's unexpected cancer and resulting illness, and related temporary disabilities of attorneys. In so finding, the court stated 'We are, however, left with a definite and firm conviction that the [bankruptcy court] committed a clear error of judgment. (Citing *In re M.J. Waterman & Assocs., Inc.*, 227 F3d at 607-608). Because the bankruptcy case failed to distinguish the particular facts of this case from neglect due to 'law office upheaval,' we find the bankruptcy court abused its discretion in denying the Debtor's motion for an extension of the time to appeal based on excusable neglect.'" *Id.*, 259 B.R. 155

Faced with the sudden, debilitating illness of his attorney of record, Goldblatt acted in the only manner available to him: he contacted his former trial attorney who had sufficient experience in Federal district and appeals courts to assist his ailing attorney until the situation could be sorted out. None of the circumstances occurring within this context that prevented adherence to the rules were within Goldblatt's control, and he acted within the limits of the control he had to address the situation as it existed.

There is no dispute that Goldblatt's bankruptcy attorney of record timely filed notice of appeal and, it is reasonable to conclude that had it not been for his untimely disability, would have completed the additional procedural steps required. The reasons that he did not fall squarely within the authorities' previous findings of "excusable neglect."

In *Pioneer Investment Services Company v. Brunswick Associated Limited Partnership et al.*, 113 S. Ct. 1489 this Court recognized that:

> "There is, of course, a range of possible explanations for a party's failure to comply with a court-ordered filing deadline. At one end of the spectrum, a party may be prevented from complying by forces beyond its control, such as by an act of God or unforeseeable human intervention. At the other, a party simply may choose to flout a deadline. . . . Under petitioner's view, any showing of fault on the part of the late filer would defeat a claim of 'excusable neglect.' . . . [B]y empowering the courts to accept late filings 'where the failure to act was the result of excusable neglect,' Rule 9006(b)(1), Congress plainly contemplated that the courts would be

> permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at 1491.

The Court went on to say that:

> This history supports our Conclusion that the enlargement of prescribed time periods under the 'excusable neglect' standard of Rule 9006(b)(1) is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer." *Id.*. at 1496.

Goldblatt would respectfully remind the Court of its own declaration, that the determination test should include

> ". . . the danger of prejudice to *the debtor,* the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* 1498.

Goldblatt fought a seven-year legal battle beginning in 1994 at the trial level to establish his ownership of the subject property. He testified to his intention to run his business on the property in deposition. He immediately acted to evict A&W from the property once the temporary injunction of the trial court dissolved by operation of law in 1999. Simultaneously Goldblatt filed an Affidavit of Business Homestead in the deed records of Tarrant County, Texas.

Texas law is clear that possession is not the only element required for establishment of a homestead claim and that intention is enough to establish the presumption of homestead. In ***McKee v. Smith***, the Second Court of Appeals

found that "*the Texas Supreme Court directs us to construe the business homestead exemption liberally*". 965 S.W.2d at 53. The presumption is that facts which establish a homestead right continue until the contrary is shown. In *Cameron v. Gebhard,* the Supreme Court of Texas said:

> ***"If a homestead cannot be acquired until it is occupied, then no one can acquire a homestead exempted from forced sale unless he buys an improved place, and then he must have a race with the sheriff for possession."*** [emphasis added] 22 Tex. at 616.

The Fifth Circuit held in *Simi* that "[I]n the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrary or capricious." The *Simi* court found "illegitimate governmental conduct that . . . deprived Simi of its property rights for the benefit of private interests." *Simi Investing Company, Inc. v. Harris* County Texas, 236 F.3d 240, 249 (5th Cir. 2000).

In its Opinion on Petition for Rehearing En Banc, the Fifth Circuit went on to say that

> "In the majority of cases involving landowner complaints, substantive due process is not the appropriate avenue of relief. Our Takings Clause jurisprudence cannot be circumvented by artful pleading of substantive due process claims. Except in the rare cases of deprivations of property based on, for example, illegitimate and arbitrary governmental abuse, vague statutes, or ***retroactive statutes***, the takings analysis

established by the Supreme Court and this circuit should control constitutional violations involving property rights that have been infringed by governmental action." 256 F.3d 323, 324 (5th Cir. 2001) [emphasis added]

Goldblatt continues to be irreparably damaged by being illegally deprived of his use, ownership and possession of his Business Homestead by A&W's actions, and is being prevented from making further attempts to secure and manage the real estate that is his by the Probate Court's conflicting decree in which he was granted ownership of the property and simultaneously denied the privileges of its ownership in violation of his Fourth Amendment rights.

CONCLUSION

There are only two issues before this Court:

First, did the Bankruptcy Court err in its refusal to follow long-standing, guiding principles regarding the designation of Goldblatt's business homestead status in Texas, and his right to the presumption thereof?

The answer is an unqualified "yes." The finding of the bankruptcy court regarding a residential homestead owned by Goldblatt is clearly in error. Goldblatt has shown each court in which he has appeared that he has only designated one piece of property as a homestead in his adult life. That property is the real estate in question in this issue. There is no other homestead.

Goldblatt is entitled by long-established and settled precedent to a "presumption" of homestead under century-old Texas law, guiding principle and authority.

Second, did the District Court err in failing to find excusable neglect?

In this matter the authorities are crystal clear. Incapacitation of a party's attorney clearly qualifies as "excusable neglect." Goldblatt's attorney of record had no

control over the deterioration of his health and neither did Goldblatt. The attorney did what he could to demonstrate Goldblatt's intention to appeal and was prevented from continuing because of the serious threat to his eyesight and the treatment required to save it. Likewise, Goldblatt did everything he could within the limited time available to him to identify another attorney to assist his bankruptcy attorney and prosecute the appeal. A&W criticizes the form, not the substance of this reality. Clearly, Goldblatt is entitled to his day in court to defend his homestead claim and should not be prevented from having his appeal heard based on an issue and under circumstances that the courts up to and including the Supreme Court of the United States have held previously to be excusable.

For the reasons above, Goldblatt respectfully requests this Court grant certiorari, and after appropriate briefing and hearing, reverse and remand this matter for new trial to the Bankruptcy Court or the Federal District Court.

Respectfully submitted,
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:
KENNETH ALLEN GOLDBLATT,
Debtor.

KENNETH ALLEN GOLDBLATT,
Appellant,

VS.

A & W INDUSTRIES, INC.,
Appellee.

ORDER

On March 7, 2001, appellant, Kenneth Allen Goldblatt, filed a notice of appeal from an order entered by the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, in Case No. 00-43193-MT-11. Pursuant to Bankruptcy Rule 8006, appellant was required to file, within ten days after filing the notice of appeal, a designation of the items to be included in the record on appeal and a statement of the issues to be presented. After the time for filing the designation and statement of the issues to be presented had expired, appellant sought to extend the deadline. Because he failed to show excusable neglect as required by Bankruptcy Rule 9006(b)(1), the motion was denied. The appeal was docketed on March 28, 2001, and appellant's brief was due within twenty days thereafter. Appellant failed to file his brief as required by Local Bankruptcy Rule 8009. Accordingly, the court finds that the above-captioned action should be dismissed. Int'l Bhd. Of Teamsters v. Braniff

Airways, Inc. (In Re Braniff Airways, Inc.), 774 F2d 1303, 1305 (5th Cir. 1985).

The court ORDERS that the above action be, and is hereby, dismissed.

SIGNED April 19, 2001.

_____(original signed by)_____
JOHN McBRYDE
United States District Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
OCT 18 2001
CHARLES R. FULBRUGE III
CLERK

No. 01-10650
Summary Calendar

In the Matter Of: KENNETH ALLEN GOLDBLATT,
Debtor.

KENNETH ALLEN GOLDBLATT,
Appellant,

versus

A & W INDUSTRIES, INC.,
Appellee

Appeal from the United States District Court
For the Northern District of Texas
USDC No. 4:01-CV-0256-A

Before JOLLY, HIGGINBOTHAM,. And PARKER, Circuit Judges.

PER CURIAM:[1]

This appeal contests the district court's order that dismissed an appeal from the bankruptcy court. The district court dismissed the appeal because Kenneth Allen Goldblatt, the debtor and appellant, failed to file his brief within the twenty day period required by Northern District of Texas Bankruptcy Rule 8009.1(a). We find no abuse of discretion and affirm.

[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

I

The relevant facts are these: In June 2000, Goldblatt designated a piece of commercial property in Grapevine, Texas as his business homestead. On June 29, Goldblatt filed for Chapter 11 protection in the United States Bankruptcy Court in the Northern District of Texas. During the ensuing bankruptcy proceedings, A & W Industries, Inc., the tenant in possession of the premises in question, filed a motion for determination of its status as a creditor. On February 28, 2001, the Bankruptcy Court issued a final order finding that the property does not meet the requirements for a business homestead under Texas law.

On March 7, 2001, Goldblatt's bankruptcy attorney filed a timely notice of appeal from the order in the bankruptcy court. The next day, because of his deteriorating health, Goldblatt's bankruptcy attorney forwarded his files for the appeal to the instant attorney. On April 2, two weeks after the March 19 deadline for filing a designation of records and a statement of issues on appeal under Bankruptcy Rule 8006, Goldblatt's substitute counsel moved to extend the deadline.[2] A & W opposed the motion. The district court found that Goldblatt's counsel had not shown that the delay in filing was the result of excusable neglect and denied Goldblatt's motion to extend the deadline for filing his designation and statement of issues. After this ruling, Goldblatt failed to file an appellate brief (or any other documents within the period set by Local

[2] Evidently, Goldblatt's counsel erroneously filed the motion in the Bankruptcy Court on April 2, and it did not reach the district court clerk until April 9. Goldblatt also asserts in his brief that his counsel filed a designation of record along with his motion to extend the deadline. A review of the record in this case indicates that no such filing was docketed in the district court or transmitted to this Court on appeal.

Bankruptcy Rule 8009.1.[3] The district court dismissed Goldblatt's appeal *sua sponte*. The court also noted Goldblatt's failure to satisfy the procedural requirements for appeal set out in Bankruptcy Rule 8006.

II

Bankruptcy Rule 8001(a) provides that the "[f]ailure of an appellant to take any step other then the timely notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court . . . deems appropriate, which may include dismissal of the appeal." Because the deadline for filing an appellate brief under rule 8009 is not jurisdictional, the failure to satisfy the deadline does not require automatic dismissal. See In re Tampa Chain Co., Inc., 835 F2d 54, 55 (2nd Cir. 1987).

While we have said that dismissal is a "penalty of last resort" to be employed sparingly, we have also made clear that a district court's dismissal of an appeal will be affirmed unless the district court abused its discretion. Matter of Braniff Airways, Inc., 774 F.2d 1303, 1305 (5th Cir. 1985); Matter of CPDC, Inc., 221 F3d 693, 698 (5th Cir. 2000). In reviewing the district court's decision, we much consider the prejudicial effect of the delay on the appellees and the bona fides of the appellant" to ensure that the client is not unduly punished for his attorney's mistakes." CPDC, 221 F.3d at 698 (citations and internal quotation marks omitted). But as the Seventh Circuit observed in Matter of Scheri, 51 F.3d 71, 75 (7th Cir. 1995):

> We . . . must remember that the district court, not the appellate court, is in the best position to assess the nature of the delay, the motivations of

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[3] Under Local Rule 8009.1(a) the appellant's opening brief must be filed within twenty days after entry of the appeal on the docket. Although Goldblatt filed his notice of appeal in the bankruptcy court on March 7, 2001, his appeal was not docketed in the district court until March 28, 2001.

> the parties and their attorneys, and the impact of the delay on the court's calendar. Consequently, our review of a district court's broad discretion to deal with litigation delay, even though the drastic sanction of dismissal is deferential.

III

With these principles in mind, we conclude that the district court acted within its discretion. We have fully considered Goldblatt's contention that his substitute counsel's various procedural failures are excusable because counsel's office received the file while he was away at trial in Starr County, Texas. In his motion to extend the Rule 8006 deadline, Goldblatt's counsel asserted that he was in trial from March 9 until March 16, 2001, and did not return to his office until March 19, 2001. The motion does not provide an account of counsel's activities between March 16 and the resumption of the Starr County trial on April 2, the dated he moved to extend the time for filing his designation and his statement of issues. Goldblatt thus offers no explanation for counsel's failure to file a motion for extension immediately after he returned to his office on March 19.

In determining whether an omission was the product of excusable neglect, courts should consider "the danger of prejudice to the [appellee], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 395 (1993). Counsel's travel schedule or absence from office is generally not sufficient to support a finding of excusable neglect. See Airline Professionals Ass'n v. ABX Air, Inc., 109 F.Supp.2d 831, 834 (S.D. Oh. 2000) ("[C]ourts still demand that an attorney show more than a busy practice

or absence fro m the office to merit an extension of the time in which to file a notice of appeal." (citation omitted).

This principle has particular force where, as here, counsel fails to request an extension before the applicable deadline passes and fails to file an appellate brief.[4] In view of the delay caused by Goldblatt's failure to file a statement of issues, a designation of the record on appeal, or an appellate brief notifying A & W of the issues on appeal, the district court could properly conclude that dismissal was warranted in this case.[5]

Accordingly, we hold that the district court did not abuse its discretion in dismissing the appeal, and its judgment is therefore

AFFIRMED.

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[4] This situation is therefore distinguishable from CPDC, 221 F.3d at 698-700, in which we reversed a district court's dismissal of a bankruptcy appeal under Rule 8001. In CPDC, the appellant filed a designation of record excerpts but failed to file a statement of issues. See id. At 695. We noted that "[a]lthough the statement of issues was not timely filed, Appellants did file their appellate brief timely and prior to the district court's dismissal of the appeal." Id. At 700.

[5] See In Re Serra Builders, Inc., 970 F2d 1309, 1311 (4th Cir. 1992) (affirming dismissal of a bankruptcy appeal because the appellant failed to file its designation of the record on appeal fifteen days late and did not request an extension until after the deadline had passed; noting that the only explanation offered was that the appellant's attorney was out of the country); Nielsen v. Price, 17 F.3d 1276, 1277 (10th Cir. 1994) (affirming dismissal of appeal from bankruptcy court judgment because, without explanation, the plaintiffs failed to designate the record on appeal, file a statement of the issues, or file an appellate brief.); see also Matter of M.A. Baheth Const. Co., Inc., 118 F.3d 1082, 1083-84 (5th Cir. 1997) (affirming district court's dismissal of an appeal under Fed. R. App. P. 6 for failure to file a designation of record and issues on appeal).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10650

In the Matter Of: KENNETH ALLEN GOLDBLATT,
Debtor.

KENNETH ALLEN GOLDBLATT,
Appellant,

v.

A & W INDUSTRIES, INC.,
Appellee

Appeal from the United States District Court
For the Northern District of Texas

U.S. COURT OF APPEALS
FILED
Nov 21 2001
CHARLES R. FULBRUGE III
CLERK

ON PETITION FOR REHEARING

Before JOLLY, HIGGINBOTHAM,. And PARKER,
Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing is **DENIED**

ENTERED FOR THE COURT:

(original signed by E. Grady Jolly)
United States Circuit Judge
REHG-2